(12)

No. 04-514

Supreme Court, U.S.
FILED
NOV 18 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Dana C. Hansen Chavis
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Of Eastern Tennessee, Inc.
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Counsel of record for Petitioner

No. 04-514

In the Supreme Court of the United States

RICKY BELL, Warden, Petitioner

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Dana C. Hansen Chavis
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Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Respondent

Comes the Respondent, Gregory Thompson, and asks leave to file the attached response to petition for writ of certiorari without prepaying of costs and to proceed *in forma pauperis.*

Respondent has previously been granted leave under 21 U.S.C. § 848(q) to proceed *in forma pauperis* in the following courts:

(1) The United States Court of Appeals for the Sixth Circuit (attached), and

(2) The United States District Court for the Eastern District of Tennessee(attached).

Respondent's affidavit or declaration in support of this motion is attached.

Dana C Hansen Chavis

Dana C. Hansen Chavis
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Of Eastern Tennessee, Inc.
530 South Gay Street Suite 900
Knoxville, TN 37902
(865) 637-7979

Counsel of record for Respondent

Case No: 00-5516
UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED

MAY 16 2000

LEONARD GREEN, Clerk

GREGORY THOMPSON

Petitioner - Appellant

v.

RICKY BELL, Warden

Respondent - Appellee

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Upon consideration of the appellant's motion to proceed in forma pauperis,

It is ORDERED that the motion be and it hereby is GRANTED.

Counsel is reminded that an application for a certificate of appealability should not resemble the final brief. A very short statement of the factual and legal argument with reference to the applicable precedent will suffice. Furthermore, as to issues raised pursuant to 28 U.S.C. §2254(d)(1), the petitioner should abide by the Supreme Court's pronouncement in William v. Taylor, 120 S.Ct.1495, 1523 (2000).

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GREGORY THOMPSON)
)
vs.) 3 98-0040
) Civil Action No.
RICKY BELL, WARDEN) Judge Robert L. Echols
)

FILED
JAN 23 4 52 PM '98
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY _____ D.C. CLERK

ORDER

The Court has before it a Motion and Application to Appoint Counsel to Investigate, Prepare and File Petition for Writ Habeas Corpus in Capital Case and to Stay Execution, and an Affidavit of Indigency.

It appears from the Affidavit of Indigency that the petitioner is unable to pay costs or give security therefor. Accordingly, the application to proceed in forma pauperis is GRANTED, and the Clerk is directed to file the petition in forma pauperis. 28 U.S.C. § 1915(a).

The Clerk is directed to serve a copy of the petition (and related papers) on the Respondent and the Attorney General of the State of Tennessee by certified mail. However, for the reasons stated below, the Respondent shall not be required to file an answer or other pleading to the petition at this time.

The Petitioner attacks the legality of his confinement under a judgment of conviction on charges of first degree murder entered by the Criminal Court for Coffee County, Tennessee. Following his conviction, he received a death sentence. The execution date is currently scheduled for February 20, 1998.

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 1-29-98 By

ATTEST: A true copy
Certified this JAN 29 1998
R. MURRY HAWKINS, CLERK
by Deputy Clerk

(3)

The Petitioner's Motion to Stay Execution is GRANTED, and the execution date is hereby STAYED pending the outcome of this matter.

Pursuant to 28 U.S.C. § 2241(d), this Court may transfer the Petitioner's Petition for Writ of Habeas Corpus to the district court for the district in which the Petitioner was tried and convicted. Accordingly, in the interest of justice, judicial economy and convenience of the parties and witnesses, this action is transferred to the United States District Court for the Eastern District of Tennessee. 28 U.S.C. § 123(c)(2).

IT IS SO ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Gregory Thompson, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ ∅	$ 0	$ ∅	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ ∅	$ 0	$ ∅	$ 0

2. List your employment history for the past two years, most recent first. (Gross mo is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthl
n/a			$
			$
			$

3. List your spouse's employment history for the past two years, most recent empl (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthl
n/a			
			$
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any othe institution.

Financial institution	Type of account	Amount you have	Amount your spou
		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not lis and ordinary household furnishings. none

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse mor amount owed. n/a

Person owing you or your spouse money	Amount owed to you	Amount owed to y
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support. none

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately paid by your spouse. Adjust any payments that are made weekly, biweekly, annually to show the monthly rate. n/a

	You	Your s
Rent or home-mortgage payment (include lot rented for mobile home)	$	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

	You	Yo
Transportation (not including motor vehicle payments)	$_____	$_
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$_____	$_
Life	$_____	$_
Health	$_____	$_
Motor Vehicle	$_____	$_
Other: _____	$_____	$_
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$_____	$_
Installment payments		
Motor Vehicle	$_____	$_
Credit card(s)	$_____	$_
Department store(s)	$_____	$_
Other: _____	$_____	$_
Alimony, maintenance, and support paid to others	$_____	$_
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_
Other (specify): _____	$_____	$_
Total monthly expenses:	$_____	$_

9. Do you expect any major changes to your monthly income or expenses or in yo liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a typist) any money for services in connection with this case, including the com form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the cos

Incarcerated on death row since 1985

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 21, 2004

Greg Thompson
(Signature)

44530

ount: 00108406 THOMPSON, GREGORY Actual Site: RMSI
tus: ACTV Sex: M Race: B Age: 42 Assigned Site: RMSI
rent Balance: 0.76 Pending Balance:

Trans Date	Seq No	Transaction Type/Code/Amount		Trans Site	Current Amount	Pend Amount
10/11/2004	3	D	COM 3.41	RMSI	0.76	
10/11/2004	2	D	COM 2.83	RMSI	4.17	
10/11/2004	1	D	MED 3.00	RMSI	7.00	
10/06/2004	1	C	PMO 10.00	RMSI	10.00	
10/05/2004	1	D	COM 1.20	RMSI		
09/22/2004	1	C	COC 0.84	RMSI	1.20	
09/20/2004	2	D	COM 2.04	RMSI	0.36	
09/20/2004	1	D	COM 23.16	RMSI	2.40	
09/13/2004	2	C	PMO 20.00	RMSI	25.56	
09/13/2004	1	D	COM 4.72	RMSI	5.56	

earch:
XT FUNCTION: DATA:
.-HELP F8-PAGEDOWN F9-QUIT F11-SUSPEND

OP OF LIST

Linda Pollock Trust Fund at RMSI 10-21-04

Lesli Hatley

LESLI HATLEY NOTARY PUBLIC AT LARGE MONTGOMERY CO. TENN.

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No. 04-514

In the Supreme Court of the United States

RICKY BELL, WARDEN
Petitioner,

v.

GREGORY THOMPSON,
Respondent.

On Petition for a Writ of Certiorari
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RESPONDENT'S BRIEF IN OPPOSITION

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Counsel of record for Respondent

QUESTIONS PRESENTED

I. When the State of Tennessee, through Petitioner, sought to execute death row inmate Gregory Thompson with disregard for the non-finality of federal proceedings, including the State's own unresolved motion, and without first seeking to finalize those proceedings, can Tennessee later be heard to complain about those federal proceedings in this Court?

II. Does a case or controversy exist where Tennessee argues it has been prejudiced by the Court of Appeals' stay of execution and remand for further district court proceedings but disregards the fact that Thompson's execution had already been stayed by the district court and disregards the fact that further district court proceedings were already under way?

III. Does the United States Court of Appeals for the Sixth Circuit have the same power to supplement the record on appeal as its Sister Circuits?

IV. Did the United States Court of Appeals for the Sixth Circuit have the power, under the particularly narrow circumstances of this case, to *sua sponte* reconsider its decision prior to the issuance of the mandate?

V. Did the Sixth Circuit Court of Appeals have to address 28 U.S.C. §2254(e)(2) even when the facts at issue were presented to the state courts? If so, did the Sixth Circuit substantially comply with §2254(e)(2) by recognizing a lack of funding prevented factual development in state court?

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I. Petitioner sought to execute Thompson, without taking steps to attempt to finalize the federal case, knowing the Court of Appeals was still considering Petitioner's motion and had not issued the mandate. Given these circumstances, this Court should not entertain Petitioner's alleged grievance. ..... {21}

II. Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court

proceedings were already under way when the Sixth Circuit decision issued ..... {23}

III. The United States Court of Appeals for the Sixth Circuit can *sua sponte* reconsider its decision prior to the issuance of the mandate. ..... {27}

IV. The United States Court of Appeals for the Sixth Circuit permissibly exercised its inherent equitable power to supplement the record on appeal ..... {34}

V. Under the circumstances of this case, 28 U.S.C. §2254(e)(2) is not triggered because the state courts were presented with the evidence considered by the Sixth Circuit Court of Appeals. Nevertheless, the Sixth Circuit substantially complied with §2254(e)(2). ..... {36}

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OPINIONS BELOW

On June 23, 2004, the United States Court of Appeals for the Sixth Circuit issued an opinion, published at 373 F.3d 688, withdrawing its earlier opinion, vacating the judgment of the United States District Court for the Eastern District of Tennessee and remanding the case to the district court for further proceedings. The court also stayed Thompson's execution for 180 days to permit the district court time to proceed. (Pet. App.1, 6). The June 21, 2004, order of the district court staying Thompson's execution pending further district court proceedings is unreported (App. 1). The opinion of the district court summarily denying Thompson's habeas petition, which is to be vacated, is unreported. (Pet. App.202).

JURISDICTION

The Sixth Circuit's judgment was entered on June 23, 2004 (Pet. App.1). Petitioner did not seek rehearing. The time for filing a petition for writ of certiorari was extended to October 13, 2004. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FED. R. APP. PRO. RULE 40 - Petition for Panel Rehearing -

(a) Time to File; Contents; Answer, Action by the Court if Granted.
(4) Action by the Court. ... the court may do any of the following:
(A) make a final disposition of the case without reargument;
(B) restore the case to the calendar for reargument or resubmission, or
(C) issue any other appropriate order

FED. R. APP. PRO. RULE 41 - Mandate, Issuance and Effective Date; Stay -

(b) When Issued. ...The court may shorten or extend the time.
(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

28 U.S.C. §2254(e)(2) - State custody; remedies in Federal Courts

(e) (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

STATEMENT OF THE CASE

Procedural Overview

Last year a three-judge panel of the Sixth Circuit Court of Appeals issued a fractured decision affirming the district court's denial of habeas relief in a 2-1 vote and three separate opinions. *Thompson v. Bell*, 315 F.3d 566 (6th Cir. 2003)(Suhrheinrich, J., delivered the opinion of the court; Moore, J., delivered a separate opinion concurring in the result only; Clay, J., delivered a separate dissenting opinion). *See also Thompson v. Bell*, 373 F.3d 688, 689 (6th Cir. 2004)(acknowledging the "panel in a split decision" produced "three different opinions."). Thompson requested and received a stay of the Sixth Circuit's mandate and petitioned this Honorable Court for a writ of certiorari. *Thompson v. Bell*, No. 03-5759. During certiorari proceedings, Petitioner filed a motion with the Sixth Circuit requesting that the court reconsider one of its previously entered orders.[1] Thompson filed a response in opposition to Petitioner's

[1]During the pendency of Thompson's petition for writ of certiorari, Petitioner filed a motion asking the Sixth Circuit to reconsider its prior order permitting Thompson's

motion. After this Court denied review, but before resolution of Petitioner's motion and the issuance of the Sixth Circuit's mandate, the State of Tennessee, through Petitioner, sought and received from the Tennessee Supreme Court a date to execute Thompson. Despite the individual opinions of three mental health professionals that Thompson was not competent for execution, the Tennessee courts denied him a *Ford* hearing[2] and allowed the execution to go forward.[3] Shortly thereafter, the United States District Court for the Eastern District of Tennessee entered a stay of execution to consider Thompson's *Ford* claim (App.1). Next, the Sixth Circuit, after reconsidering the case *sua sponte* and expanding the record on appeal, corrected its earlier decision. *See* FED. R. APP. PRO. 40. The newly united panel remanded the case to the district court for further proceedings on Thompson's Sixth Amendment ineffective assistance of counsel claim. *Thompson*, 373 F.3d at 692. Petitioner sought and obtained a stay of the Sixth Circuit's mandate and filed the instant petition.

Pre-trial

Thompson's trial counsel knew that Thompson's mental state was an issue for the defense (Apx. 852, 845[4]). Under the circumstances of the case, trial counsel could understand kidnapping the victim to obtain her car but could not understand why the

counsel permission to appear in ancillary state court proceedings (App. 223). That motion remains pending to this day.

[2]*Ford v. Wainwright*, 477 U.S. 399 (1986).

[3]*Thompson v. State*, 134 S.W.3d 168 (Tenn. 2004). The parties' filings can be viewed at www.tsc.state.tn.us/OPINIONS/TSC/CapCases/ThompsonG/ThompsonG.htm

[4]Citations to "Apx. _" refer to the joint appendix filed with the Sixth Circuit.

victim had been killed when there were other alternatives and knew that the jury would have the same lingering question (Apx. 830).

Counsel filed a notice of insanity defense (Apx. 775) and requested a mental health evaluation of Thompson (Apx. 18, 770). Counsel wanted

> a psychiatric examination and a neurological examination to determine whether Thompson was competent to stand trial and assist counsel with his defense, whether Thompson was suffering from a mental illness on the date of the offense, and whether he was in need of hospitalization for further psychiatric treatment and evaluation. In support, [trial attorney] Parsons attached an affidavit stating that Thompson had previously suffered two concussions...

Thompson, 315 F.3d at 572. The trial court sent Thompson to Middle Tennessee Mental Health Institute ("MTMHI"), a state facility, for an evaluation of sanity and competency (Apx. 19, 21, Apx. 23). "MTMHI's records contained only sketchy information related to Thompson's history before ... the murder." *Thompson*, 373 F.3d at 727. The MTMHI records did contain staff notes of Thompson's unusual and inappropriate behavior on the ward (Trial Transcript V.20 p.161-162). Dr. Watson, of MTMHI, said Thompson reported hearing voices and said he could not read or write (*id.* at p.53-154). The MMPI administered at the state facility revealed a schizophrenic score "at the top of the graph" but Dr. Watson discounted this score as an attempt by Thompson to endorse all psychotic features, in other words, he was "malingering" (*id.* at 153). Another test, however, showed Thompson was defensive and tried to portray himself in a good light (*id.* at 156) and at no time during his 30-day evaluation at MTMHI did Thompson assert a mental health defense to the crime. MTMHI staff concluded Thompson was mentally competent to stand trial and was not insane at the time of the crime.

Counsel asked for funding, pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985), to hire a psychiatrist "because they questioned the reliability of the forensic team at MTMHI;" because "Thompson told counsel about his head injuries;" and, because "Thompson's mental status was in issue after he was charged in this case, he was going to be on trial for his life, and the state was going to present evidence of his future dangerousness," *Thompson*, 315 F.3d at 572-573 (lead opinion), 599 (dissent). The request was granted "for the purpose of affording counsel the benefit of private expert psychiatric consultation in regards to the defendant ... to ensure that the constitutional rights of the defendant are properly protected" (Apx. 24).

Despite (a) the court's order approving a psychiatrist to examine Thompson and assist the defense; (b) trial counsel's knowledge that the State would have psychiatric and other medical opinions of Thompson at its disposal; (c) counsel's skepticism of the MTMHI conclusions; (d) the fact that "counsel were aware that Thompson exhibited possible symptoms of mental illness" and knew "Thompson was experiencing 'extreme mood changes' ... [and] ... knew of Thompson's violent behaviors in the military, which were in stark contrast to Thompson's previous history," *Thompson*, 373 F.3d at 729; and (e) the *Ake* prescription of "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," *Ake*, 470 U.S. at 83, counsel did not use the funds to hire a competent forensic mental health expert. Counsel claimed the effort to hire a psychiatrist simply "was not successful" (Apx. 860), however, trial attorney Richardson admitted "he probably could have" found a psychiatrist to say Thompson had brain damage,

Thompson, 315 F.3d at 578. Instead, counsel used the court-ordered mental health funds to hire Dr. Copple, who was not a competent psychiatrist but an "industrial psychologist" (Apx. 773). Counsel did not ask him to investigate Thompson's mental health for mitigation purposes or to conduct an evaluation for purposes of rebutting the findings of the MTMHI team.

Dr. Copple "did not take a thorough history" and was unaware of Thompson's psychotic symptoms. *Thompson*, 373 F.3d at 727-728. Consistent with his background and training, the industrial psychologist stated his examination of Thompson focused on "what things he might be capable of doing in a prison situation" (Trial Transcript, V.18 p.121). Later on, counsel admitted that Dr. Copple – whom they had selected and hired with the court-approved funds – "was not an expert in criminal behavior" (Apx. 77) (emphasis added).

Trial

Counsel conceded guilt and did not defend the guilt phase case (Apx. 848). Counsel simply told the jury that during the crime Thompson's "decision-making abilities by this time had apparently gone completely down the drain" (Trial Transcript V.13 p.32) and the only explanation was "ineptitude and being harebrained and a bad decision maker and something having snapped in him." (*Id.* at p.36). Counsel's closing argument again conceded guilt and told the jury, "[s]omehow, this is a situation without an explanation" (Trial Transcript V.16 p.85) and "I don't know why this happened." (*Id.* at p.92). Thompson was convicted of first degree murder.

Counsel did promise during opening argument to tell the jury "who Greg

Thompson is" (Trial Transcript V.13 p.21) and promised they would "do everything we could to let you know Greg Thompson", (*e.g.*Trial Transcript V.21 p.46).[5] Counsel promised the jury he would "take you through his life, show you what his background is, show you the influence in his life, which make us what we are I guess. We are going to give you everything along that line that we can." (Trial Transcript V.13 p.38). Although counsel promised the jury "we are going to trace his whole life because that's the way you will learn the most about him" (Trial Transcript V.17 p.40), without adequately investigating Thompson's life history and unassisted by a competent mental health expert, counsel could not explain Thompson's drastic change in behavior subsequent to high school. At the punishment phase, counsel offered the jury what little information they had: witness testimony about Thompson's good acts and exemplary behavior up through his high school years (Apx. 859); his prior head injuries (Apx. 831); and Thompson's recent, radical change in behavior (Apx. 800).

But Thompson's changed behavior remained unexplained. As Judge Clay observed in his initial dissenting opinion:

> *[W]hat Thompson needed at the sentencing phase of the trial was not an industrial psychologist opining about whether Thompson would "thrive" in prison, but a qualified expert who would help him escape the death penalty by giving testimony about his mental condition so as to convince the jury that the mitigating circumstances outweighed the aggravating factors. Thompson*, 315 F.3d at 604.

Without obtaining a comprehensive social history, the evidence of which "was not subtle," *Thompson*, 373 F.3d at 728, and without a competent mental health expert to

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[5]Trial counsel made this promise, not once but, at least six times: Trial Transcript V.13 p.21, 38; V.21 p.29, 46, 48, 49.

conduct an appropriate examination, counsel was unable to explain the significance of Thompson's changed behavior or even address – much less counter – the state mental health team's conclusion that Thompson had neither brain damage nor "psycho-motor impairment" (Apx. 832) and, instead, was "malingering" mental illness (Trial Transcript V.20 p.153).

The industrial psychologist ignored Thompson's radical early-adulthood change in behavior and instead proposed that Thompson committed the brutal murder due to a need to nurture people – in this case, co-defendant Joann MacNamara (Apx. 816). Remarkably, Dr. Copple even stated that Thompson was not suffering from any mental illness. *Thompson*, 315 F.3d at 575. This "nurturance" theory was incomprehensible. Judge Clay stated:

> ***Indeed, by accounting for the marked change in Thompson's behavior after he joined the Navy, expert psychiatric testimony supporting the notion that Thompson suffered from mental illness or an adverse mental condition would have provided a plausible explanation for Thompson's "positive qualities" in contradistinction to his subsequent violent behavior. However, by not being able to offer the jury any plausible psychiatric explanation regarding the significance of Thompson's change in behavior as witnessed by Cajulao and others, his trial counsel essentially abdicated their roles as meaningful advocates on behalf of their client. This is because defense counsel had nothing with which to rebut the state's proofs after opening the door to the issue of whether Thompson was a "good person."***

Id. at 606-607 (dissent).

During closing penalty-phase argument, counsel was reduced to begging for mercy, as opposed to arguing the strength of mitigating factors, stating, "[W]e have tried to show you Greg Thompson and an explanation of this crime, so you will understand why we ask for mercy now" (Trial Transcript V.21 p.29). Because of counsel's failures,

Thompson was sentenced to death.

Motion for New Trial

The jury foreman testified during the motion for new trial that the jurors needed to hear "those contributing factors that might have led him [Thompson] to turn from a well-rounded young man, I'll say, to the type of person he turned out to be." He testified:

> He had committed a crime that was just hard to understand. It was even harder to understand when you considered his background. ... but I'm saying he got an A+ until he was 18 years old. On the other hand, in trying to do this, the thing that was probably the most damaging to him--and I realize this might be expounding a little bit, but it is important because this man's life is at stake--from the time he was 18 years of age on, the jury--and they searched--found very little that showed the same good positive person that had been developed previously. In fact, it was overwhelmingly negative. When I say "overwhelmingly," I couldn't put a percentage, but very, very high. We talked about those things because that becomes important when you are considering his capabilities. What we saw was a man that had been trained to be good that had chosen to more or less wallow, if you will excuse the expression, in the mire. Socially, he was doing things that was totally unacceptable at times. (Motion for New Trial, V.1 p.73-74). ...
>
> ...he is in full capacity of all of his emotions and feelings. This man thought he was very cool. That was the most damaging single thing. This said to us, and incidentally this was discussed at length, this said to us that this man had the mental capacity and the reasoning power to be in control of himself and that he had been taught better as a young boy and that he should have known better. He had the principles instilled in him, and that was damaging. (*Id.* at 76).
>
> I have stated, and I believe, that the one fact that was not as developed as I would have thought, out of a case that was as detailed as it was, was his age and those contributing factors that might have led him to turn from a well-rounded young man, I'll say, to the type of person he turned out to be. ... You do not say to take a man's life without being doggone serious, folks. We did that, and we discussed that at length among ourselves; and the conclusion--and I have to say that I agreed with it--was that he was old enough and had the background to have done better than he did; but I do think that probably more could have been done along that line. (*Id.* at 77-

78).

This testimony unequivocally demonstrates that, but for counsel's failure to investigate Thompson's life history and obtain a qualified mental health expert to discover and explain Thompson's changed demeanor, the jury would not have sentenced Thompson to death.

State Post-Conviction

Post-conviction counsel's repeated requests for expert funding were denied (Apx. 839). The prosecutor argued Thompson was not entitled to experts at state expense (Apx. 844). Nor did State law provide for expert services on post-conviction. *Teague v. State*, 772 S.W.2d 915, 927 (Tenn.Crim.App. 1989). In support of the funding requests counsel submitted the affidavit of forensic psychologist, Dr. Gillian Blair, who opined that, based on existing information, Thompson had shown a deteriorating mental status since at least 1985, Thompson was likely suffering from schizophrenia at the time of crime, and further expert evaluation was required (Apx. 862, 882). Specifically, Dr. Blair indicated "a complete social and family history is critical to the establishment of a diagnosis of mental illness." *Thompson*, 373 F.3d at 727 *citing Thompson*, 315 F.3d at 579. The defense was still denied funding so the only expert testimony presented at the post-conviction hearing came from Dr. Blair, who was subpoenaed to testify without compensation and without having the full history that was "needed to determine whether Thompson was schizophrenic at the time of the offense." *Thompson*, 373 F.3d at 729.

Dr. Blair testified that Thompson's treating prison psychiatrists

> had diagnosed him as either having a bipolar disorder or a schizo affective disorder or schizophrenia. They described his agitated behavior. They described his hostility. They described his inappropriate affect, his experience of auditory hallucinations, his delusions, his paranoia, his thoughts of persecution. He had attempted suicide on a couple of occasions. He had set fire to his cell burning both his hands and his face. They had certainly – two of those psychiatrists and maybe all three of them had considered the possibility that he was malingering, that he was faking mental illness and throughout their Riverbend records, it was clear that those psychiatrists had discounted the possibility of malingering because they didn't feel that it accounted for all of the psychotic symptoms they saw in him. (Apx. 872).

Dr. Blair said schizophrenia and bipolar disorder generally begin in early adulthood (Apx. 878). Thompson's drastic change of behavior subsequent to high school and prior to the instant offense, when he was 17-23 years old, coupled with his history of head injuries which were ignored by the industrial psychologist, actually indicated the onset of mental illness.

The State countered with the argument that Thompson was not mentally ill (Apx. 886), and instead was "malingering" mental illness. Because Thompson was denied funding for Dr. Blair to do a current and complete evaluation and for a mitigation expert to conduct a full investigation and compile a life history, he could not counter the State's argument nor demonstrate *Strickland* prejudice. All counsel could do was submit Thompson's prison medical records into evidence (Apx. 842, 889-1542). The post-conviction court denied relief. The state appellate court affirmed denying Thompson's ineffective assistance of counsel claim on it merits. *Thompson v. State*, 958 S.W.2d 156, 177 (Tenn.Crim.App. 1997).

Federal District Court

Thompson's habeas corpus petition alleged ineffective assistance of trial counsel

via the failure to adequately investigate and obtain adequate expert assistance regarding Thompson's mental health at the time of the offense and failure to direct an expert inquiry into mental health mitigation and to obtain rebuttal evidence against the State's psychiatrist.[6] The State moved for summary judgment, asserting only that the claims were either procedurally barred or the state court decision was not contrary to or an unreasonable application of federal law (Apx. 442) because Dr. Blair had not offered a final opinion on Thompson's mental health at the time of the offense (which, of course, she was prevented from doing by the post-conviction court's denial of funding). The State also asserted Thompson was not entitled to present further evidence in support of his claims in a federal court evidentiary hearing.[7] Thompson responded to the summary judgment motion by asserting that he had not failed to develop the factual basis of his claim; instead, the state trial court had denied him expert funding to do so and the state appellate court, through the after-the-fact application of procedural rules governing the appointment of experts in state post-conviction cases, prevented him from fully developing his claim. Because of these state impediments, Thompson asserted he was entitled to an evidentiary hearing to present further evidence in support of his claims.

When the Federal District Court for the Eastern District of Tennessee issued its decision granting the State's motion for summary judgment, it by-passed the State's

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[6]Thompson further alleged the State of Tennessee failed to disclose exculpatory evidence and/or presented false evidence regarding Thompson's mental illness both during trial and state post-conviction proceedings.

[7]Respondent's motion was decided prior to *Williams (Michael) v. Taylor*, 529 U.S. 420 (2000).

argument as well as Thompson's response and instead held that the claim would be denied because Thompson had failed to present the district court with affidavits or other evidence (Apx. 711). The district court never provided Thompson with notice of its intention to rely on this ground nor did it provide him with an opportunity to present such evidence before entering judgment against him. Thompson had such evidence in his possession and, contrary to the finding of the district court, most of it was in the record. *See Thompson*, 315 F.3d at 607-609; *Thompson*, 373 F.3d at 728-729. Despite this unrebutted evidence, the district court noted from the trial record that "[t]he team at Central State concluded there was no organicity (brain damage) and Dr. Copple [the industrial psychologist] found no indication of brain damage" (Apx. 701). The court ruled that due to a lack of affidavits, "Thompson has failed to provide any significant probative evidence which would make it necessary for this Court to resolve a factual dispute" (Apx. 711). The petition was dismissed.

Sixth Circuit Proceedings

The Sixth Circuit granted a certificate of appealability on September 12, 2000.

After Thompson filed his initial proof brief on November 16, 2000, the State conceded that Thompson has long suffered from mental illness and was then incompetent. On January 11, 2001, the State initiated conservatorship proceedings against Thompson. A state trial court found Thompson to be "disabled" and appointed a conservator. The conservator had the power to make decisions regarding Thompson's medical treatment and the power to consent to forced medication. A notice of supplemental authority was filed in the Sixth Circuit which contained information relative to the conservatorship proceedings and Thompson's mental illness.

The State's appellate brief was filed on February 15, 2001. While successor habeas counsel was preparing Thompson's reply brief (filed on March 9, 2001), it was discovered that the report and deposition of Dr. Faye Sultan had not been filed in the district court record. On March 2, 2001, a FED.R.CIV.PROC. Rule 60(b) motion was filed with the district court requesting the court to enter the report and deposition into the record, consider that information and revise its earlier judgment. A motion was filed in the Sixth Circuit requesting an abeyance until resolution of the 60(b) proceedings. On March 7, 2001, the district court denied the Rule 60(b) motion (Pet. App. 343) and the Sixth Circuit denied the abeyance motion on March 21, 2001 stating that the district court had ruled on the motion (Pet. App.345).

State Court Coram Nobis Proceedings

On May 29, 2001, a petition for writ of error *coram nobis* was filed in the state trial court pursuant to TENN. CODE ANN. § 40-26-105, *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992) and *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001) (holding *coram nobis* is an available remedy for newly discovered evidence). (App.6). A reply to the State's response was filed on July 19, 2001, to which was attached Dr. Sultan's report and deposition (App.26). The state trial court's denial of *coram nobis* relief on September 5, 2001 (App.194) was affirmed by the Tennessee Court of Criminal Appeals on August 15, 2002 (App.199). The Tennessee Supreme Court denied Thompson's application for permission to appeal on December 23, 2002 (App.205).

Sixth Circuit Proceedings, continued

On June 4, 2001, Thompson filed a notice of recent filing alerting the Court of

Appeals to the fact that a *coram nobis* petition was pending in the state trial court raising the new information obtained from the State-initiated conservatorship proceedings. A motion to hold the appeal in abeyance pending resolution of this related state court proceeding was also filed. The State opposed the abeyance motion and the court denied the motion on June 22, 2001 (App.207). On July 3, 2001, Thompson alerted the Court of Appeals to the State's then recent position on Thompson's mental state (App.209).

Oral Argument Before the Sixth Circuit Court of Appeals

Oral argument was held on November 1, 2001. When asked by the panel "whether Dr. Crown stated in his deposition that Thompson's schizo-affective disorder may have begun while he was in the Navy?", the State responded,

> "Dr. Crown testified that he had, that Thompson suffered from psychological impairments for many years. He testified that he began having, and this may be as close as I can get, a more difficult time in his life in the last stages of his military service. He testified that the beginning of psychological disorders could be tracked to there, so there was some suggestion in his testimony that there may have been some, he used the word difficulties, he used the word psychological problems, impairments, reaching as far back to his military service."

In response to the follow up inquiry, "which, of course, was before the murder?", the State agreed, "it was before the time of the murder, that's correct."

Again, during oral argument before the panel, the State was asked to hypothesize, based on facts in the record:

> suppose the next day [after Thompson was incarcerated] he starts exhibiting schizophrenic behavior and he is diagnosed shortly thereafter with schizophrenia, why would that not be highly suggestive that at least at the time of his trial he was schizophrenic?

The State again agreed, responding:

> "Well, I, Your Honor, I think that it could be highly suggestive that he was schizophrenic at the time of his trial. It doesn't necessarily mean he was incompetent to stand trial [question omitted] And it doesn't necessarily mean that he was insane at the time of the offense [question omitted] It could be relevant as a mitigating factor."

Federal Court Proceedings, continued

The Sixth Circuit Court of Appeals issued a fractured decision affirming the district court with a 2-1 vote and three separate opinions, *Thompson*, 315 F.3d 566; *see also Thompson*, 373 F.3d at 689. Essential to the initial conclusion that Thompson was not denied effective assistance of counsel was Judge Suhrheinrich's finding that Thompson "has never submitted *to any court* any proof that he suffered from severe mental illness at the time of the crime." *Thompson*, 373 F.3d at 692 (emphasis supplied) *quoting, Thompson*, 315 F.2d at 590. Judge Moore concurred in the result as determined by Judge Suhrheinrich stating,

> While I have sympathy for the view expounded in the dissent ... I cannot conclude that Thompson's trial counsel was constitutionally ineffective ... because Thompson has presented no evidence that his counsel knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of the crime.

Thompson, 315 F.3d at 595.

Judge Clay dissented finding "the state court's conclusion that Thompson's trial counsel were not constitutionally ineffective was an unreasonable application of *Strickland* ... ." *Id.* at 596. Judge Clay found Thompson's case "fits squarely within the line of [Sixth Circuit] cases in which counsel's failure to have a reasonable trial strategy in a capital case constitutes ineffective assistance of counsel." *Id.* at 599; *see also id.* at 609-610. He would have reversed the district court's judgment and remanded the

case to the district court for issuance of a conditional writ of habeas corpus. *Id.* at 596, 610.

Thompson's petition for rehearing *en banc* was denied on March 10, 2003. On March 24, 2003, the Court of Appeals granted Thompson's motion to stay issuance of the mandate pending his petition for certiorari (App.216).

Not long after, the panel questioned whether its decision to affirm the district court's denial of habeas relief was mistaken or improvident. *Thompson*, 373 F.3d at 693, 694.

On August 21, 2003, Petitioner moved the Court of Appeals to reconsider an order dated July 26, 2002 (App.223). [8] Thompson filed a response on August 28, 2003 (App.237).

On December 1, 2003, this Court denied certiorari review. *Thompson v. Bell*, 124 S.Ct. 804 (2004). Thompson petitioned for rehearing. Thompson's request of the Court of Appeals to continue the stay of the mandate was granted on December 12, 2003 (App.216). On January 20, 2004, this Court denied the petition for rehearing. *Thompson v. Bell*, 124 S.Ct. 1162 (2004).

The following day, January 21, 2004, Petitioner moved the Tennessee Supreme Court to set an execution date for Thompson (App.218). On January 23, 2004, the Sixth Circuit Court of Appeals received this Court's order denying rehearing.

On February 25, 2004, the Tennessee Supreme Court set Thompson's execution date for August 19, 2004, and remanded the case to the state trial court for a

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[8] Petitioner asked the Sixth Circuit to withdraw its order expanding the appointment of undersigned counsel to include state court proceedings.

determination on Thompson's competency to be executed. Although affidavits from three mental health professionals stated Thompson was incompetent to be executed, the state trial court dismissed the case without a hearing. The Tennessee Supreme Court affirmed. *Thompson v. Bell*, 134 S.W.3d 168 (Tenn. 2004).

On June 14, 2004, a motion for stay of execution and a petition for writ of habeas corpus was filed in the federal district court raising the *Ford v. Wainwright*, *supra*, claim.[9] On June 21, 2004, the district court entered a stay of execution pending a determination on the petition (App.1).

On June 23, 2004, the newly-united panel of the Court of Appeals issued an opinion vacating the district court judgment, remanding to the district court for further proceedings and entering a 180-day stay of execution. *Thompson*, 373 F.3d 688. The Sixth Circuit panel unanimously agreed to correct its earlier opinion, expanded the appellate record and remanded the case to the district court. Speaking for the court, Judge Suhrheinrich found Thompson's trial counsel ineffective:

> In sum, trial counsels' conduct failed to render effective assistance of counsel guaranteed by the *Sixth Amendment* by failing to conduct a reasonable investigation of Thompson's social history and present powerful, readily available mitigating evidence, and by failing to pursue known leads that might have helped them to prepare their case in mitigation.

Id. at 729 (Suhrheinrich, J., concurring).[10]

On July 1, 2004, Petitioner moved for a stay of the Court of Appeals' mandate

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[9]The district court previously dismissed this claim without prejudice on ripeness grounds (Pet. App.326).

[10]Justices Moore and Clay said "Judge Suhrheinrich summarizes most effectively" the ineffective assistance of counsel issue. *Thompson*, 373 F.3d at 690.

which was granted on July 21, 2004. On September 22, 2004, Petitioner moved for a further stay of the mandate which was granted on September 28, 2004.

SUMMARY OF THE ARGUMENT

The petition should be denied. Petitioner's alleged harm is that the Court of Appeals entered a stay of execution and derailed the State's attempt to execute Thompson. But Thompson's execution had already been stayed by the federal district court when the Sixth Circuit opinion issued. Additionally, Petitioner knew the Sixth Circuit proceedings were not final because a motion filed by Petitioner was still pending and the mandate had not issued. Petitioner did not attempt to finalize the Sixth Circuit proceedings or seek issuance of the Sixth Circuit mandate before invoking state court proceedings to execute Thompson. Under these circumstances, this Court should not entertain Petitioner's alleged grievance.

Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court proceedings were already under way when the Sixth Circuit decision issued. Any alleged harm to Petitioner was caused by the stay of execution entered by the district court, however, the district court's actions are not disputed in the petition.

Petitioner is merely appealing an order remanding the case to the district court for further proceedings. Any suggestion that the Sixth Circuit's order might cause confusion is simply speculation which lacks the immediacy and reality required for this Court to review the substantive issues presented in the petition.

It is well settled that a court of appeals retains jurisdiction over a case until the

mandate issues. It is also well settled that intervening Supreme Court proceedings do not strip from a court of appeals control of its mandate if the mandate is stayed for a reason independent of the certiorari proceedings and prior to receipt of the order denying certiorari. Also, the inherent authority of an appellate court to conduct a *sua sponte* rehearing of a case over which it maintains jurisdiction is well established. These are the circumstances presented in this case which distinguish it from *Calderon* and, in fact, place this case squarely within the exception to the rule of *Calderon*. Accordingly, this case does not present a violation of *Calderon*. It is simply a case where the Sixth Circuit exercised its discretion to *sua sponte* reconsider its decision prior to the issuance of the mandate. There are no compelling reasons for this Court to review the decision below.

The overwhelming majority of circuit courts of appeal agree that a court of appeals has the inherent equitable power to supplement the record on appeal. The Sixth Circuit's exercise of its discretion to supplement the record in Thompson's case is consistent with well-settled authority and presents no circumstances worthy of this Court's review.

The state courts were presented with the facts at issue so 28 U.S.C. §2254(e)(2) is not triggered in this case. Even if it were, the Sixth Circuit substantially complied with that provision when it found that Thompson was denied funding required for the development of the facts. These circumstances distinguish this case from *Holland v. Jackson* therefore presenting no conflict with this Court's caselaw or any compelling reason for this Court's review. The petition should be denied.

ARGUMENT

I. Petitioner sought to execute Thompson, without taking steps to attempt to finalize the federal case, knowing the Court of Appeals was still considering Petitioner's motion and had not issued the mandate. Given these circumstances, this Court should not entertain Petitioner's alleged grievance.

Petitioner alleges the state court set an execution date "[b]elieving that Thompson's federal habeas case was once and for all final" (petition p.15, 27).[11] What Petitioner neglects to reveal is that the State sought an execution date on January 21, 2004, the day after this Court denied Thompson's petition for rehearing (App.349). At the time the State sought an execution date, the last entry on the Sixth Circuit's docket for this case reveals an "order granting motion to continue stay of the mandate" dated December 12, 2003. At the time the State sought an execution date, the Sixth Circuit had not even received notice from this Court that rehearing had been denied. That notice was not received until January 23, 2004. Clearly, when the State sought an execution date the Sixth Circuit's mandate had not issued and the State did not, as alleged, rely "on the apparent finality of the federal judgment" (petition p.16).

The State cannot genuinely claim to be "surprised" by the Sixth Circuit's opinion (petition p.28). Even a cursory review of the docket would reveal that on the day the State sought an execution date the Sixth Circuit was unaware of the action in this Court and the mandate had not issued. The idea that the Sixth Circuit was working "behind the scenes" (petition p.16) to "frustrate[] the comity between the federal and state

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[11]The Tennessee Supreme Court relied upon and accepted Petitioner's representation that Thompson's "three-tier appellate review process was completed." (App.220).

courts" (petition p.17, 28) is belied by the fact that it was Petitioner who initiated state court proceedings to execute Thompson before the Sixth Circuit mandate issued.

Petitioner concedes the mandate had not issued in this case (petition p.19) but complains that no further order was entered by the Sixth Circuit and laments that "[t]he mandate simply did not issue." (Petition p.19). However, Petitioner fails to mention that there was good cause for the court to not immediately issue the mandate: Petitioner had a pending motion before the court. *Thompson*, 373 F.3d at 726 n. 12. Petitioner did not seek to finalize this proceeding by either asking for expedited consideration of its motion or moving to withdraw the motion. Petitioner also failed to move for issuance of the mandate or lodge an objection with the Court of Appeals. At the time, Petitioner paid no heed to the fact that the mandate had not issued and instead invoked state court procedures and pursued Thompson's execution.

Even after the Sixth Circuit issued an opinion adverse to Petitioner, Petitioner did not seek panel reconsideration or rehearing *en banc* to give the Court of Appeals an opportunity to first address Petitioner's grievance. Instead, Petitioner brought his unpreserved claim directly to this Court in search of a favorable determination.[12]

> No procedural principle is more familiar to this Court than that constitutional rights, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

United States v. Olano, 507 U.S. 725, 731 (1993) *quoting Yakus v. United States*, 321

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[12]As stated by Chief Justice Taft in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923):

> The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

U.S. 414, 444 (1944). "While this Court in its discretion sometimes departs from this rule in cases from lower federal courts," *Yakus*, 321 U.S. at 444-445, that discretion is exercised "sparingly," *Jones v. United States*, 527 U.S. 373, 389 (1999), and the Court "invariably adheres to [this rule] in cases from state courts." *Yakus*, *supra* at 445. Petitioner did not raise an objection before the Sixth Circuit, thereby denying that court an opportunity to first address the issues raised in the instant petition. Therefore, the issues raised should be deemed forfeited. Further, it was Petitioner's motion that remained pending before the Court of Appeals and Petitioner did not seek resolution of that motion before initiating state court proceedings to execute Thompson. Lastly, under these circumstances, Petitioner could not and did not, in fact, detrimentally rely upon "the apparent finality" of the federal proceedings. For these reasons, the petition should be denied.

II. Petitioner alleges no injury in fact where the Sixth Circuit decision does not alter the present posture of this case and where the State was not prejudiced because Thompson's execution had already been stayed by the district court and further district court proceedings were already under way when the Sixth Circuit decision issued

The alleged controversy is merely academic because the Sixth Circuit's opinion is not the cause of Petitioner's alleged injury. Petitioner declares, "the State marshalled [sic] the full force of its judicial machinery in what should have been the final step toward [Thompson's] execution" but was "frustrate[d]" in its efforts by the Sixth Circuit. (Petition p.27-28 *see also* p.16 "the State's efforts to carry out its sentence were suddenly blocked when the Sixth Circuit withdrew it previous opinion..."). Petitioner neglects the fact that it initiated state court proceedings despite the pending Sixth

Circuit proceeding. Petitioner also ignores the fact that two days before the Sixth Circuit's action, the District Court for the Eastern District of Tennessee entered a stay of execution (App.1).[13] The district court also ordered proceedings on the newly-ripe *Ford* claim[14] in Thompson's habeas petition. The district court's stay of execution is to remain for the duration of the *Ford* proceedings and "remain in place upon issuance of an order granting the writ" (App.1). The State did not object to, or attempt to appeal, the district court's order. Accordingly, the State's efforts to execute Thompson were not "suddenly blocked" by the Sixth Circuit. The State's injury, if any, resulted from the stay of execution previously entered by the district court and that complaint is not presented in the petition.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), this Court, through Justice Scalia, summarized the law defining constitutional standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, [citations omitted], (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" [citations omitted] Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court."

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[13]Counsel have a "duty to inform the Court" of facts that may raise a question as to justiciability of the case. *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) *quoting Fusari v. Steinberg*, 419 U.S. 379, 391 (1975); *accord, Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). Although Petitioner briefly noted that the district court was the first to stop Thompson's execution (petition p.6), the district court's order was not included in Petitioner's appendix nor was it again mentioned.

[14]*Ford v. Wainwright*, 477 U.S. 399, 409 (1986)(the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane).

> [citation omitted] Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [citation omitted]

See also Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982)(dismissing an appeal where the appellant was "without standing to invoke our jurisdiction" to seek review of a decision that had no concrete impact on it). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998).[15] The case-or-controversy requirement is lacking here.

The entry of a 180-day stay of execution by the Sixth Circuit had no causal connection to the State's alleged injury regarding its "reliance" upon "apparent" finality in order to execute Thompson. Nor did the stay have a concrete impact on the State's effort to execute Thompson. The State had already been ordered by the district court not to execute Thompson. Regardless of whether the Sixth Circuit acted, Thompson's execution would currently be stayed and proceedings would be underway in the district court. The State has not been injured and therefore the petition should be denied.

Additionally, Petitioner is merely appealing the order remanding for further proceedings. The Court's exercise of certiorari jurisdiction is "to be exercised sparingly .... And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of finality in the federal proceedings below may furnish "sufficient ground for the denial of the application." *Id.* Petitioner raises the specter that the Sixth Circuit's remand "for

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[15]The party invoking federal jurisdiction bears the burden of establishing its existence. *Id.*

proceedings not inconsistent with this opinion," (petition, p. 29), might cause "confusion" in the District Court (petition p.29-30). But "[a]llegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). This Court concerns itself with only present, real controversies:

> Such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," *Hall v. Beals*, 396 U.S. 45, 49 (1969), in the absence of evidence that this is a prospect of immediacy and reality. [citations omitted]

Bd. of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238, 240 (1985). Petitioner's speculation that there might be confusion does not warrant the expenditure of this Court's time when this issue, if it exists at all, may be addressed by the courts below.

Another fact neglected by Petitioner is that the State has taken advantage of the Sixth Circuit's stay of the mandate by initiating a motion with that court which, even today, remains pending. Relying on the fact that the Sixth Circuit retained jurisdiction pending Thompson's petition for writ of certiorari (App.347), the State moved the Court of Appeals to reconsider an order that had been issued almost a year previously.[16] The pendency of that motion gave cause for the Sixth Circuit to not immediately issue the mandate. The State's motion is still pending in the Sixth Circuit. *Thompson*, 373 F.3d at 726 n.12. Additionally, since issuance of the Sixth Circuit's June 2004 opinion, Petitioner has requested and obtained two stays of the Sixth Circuit's mandate. Clearly, Petitioner has benefitted from the Sixth Circuit's stay of its mandate by invoking the

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[16]On July 26, 2002, the Sixth Circuit expanded the scope of undersigned's representation of Thompson to include state court proceedings. At that time, the State was defending the conservatorship of Thompson and attempting to remove Thompson's counsel from representing his interests in proceedings to terminate the conservatorship with its forced medication provision.

same procedure as Thompson; a procedure of which it cannot now be heard to complain.

Because this "Court will not pass upon the validity of a [rule] upon complaint of one who fails to show that he is injured by its operation," nor will the Court "pass upon the constitutionality of a [rule] at the instance of one who has availed himself of its benefits," *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347, 348 (1936) (Brandeis, J., concurring), the petition should be denied.

III. The United States Court of Appeals for the Sixth Circuit can *sua sponte* reconsider its decision prior to the issuance of the mandate.

A court of appeals retains jurisdiction over a case until the mandate issues. *The Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-52 (6th Cir. 1999); *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281 (1st Cir. 1993). Here, because the Sixth Circuit had not issued the mandate the case remained open. *See Ostrer v. United States*, 574 F.2d 594, 598 (2d Cir. 1978)("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came."). Accordingly, before issuance of the mandate, the Sixth Circuit had discretion to conduct a *sua sponte* rehearing and correct an injustice resulting from its initial decision. *Hemstreet v. Greiner*, 378 F.3d 265, 269 (2d Cir. 2004)("We have the authority to reconsider a decision *sua sponte* ... particularly where we are faced with extraordinary circumstances and the realization that injustice would ensue.")(citation omitted); *Wilson v. Ozmint*, 357 F.3d 461, 464 (4th Cir. 2004)("The mandate of the court has not yet issued in this case, and therefore, we may, at our discretion, 'amend what we previously decided to make it

conform' to the facts of the case ... without need of finding that the case presents the sort of 'grave, unforeseen contingencies,' which would be necessary to recall a mandate that had already issued.") *quoting, Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977) *and, Calderon v. Thompson*, 523 U.S. 538, 550 (1998); *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989)("where the mandate has not issued the availability of appeal has not yet been exhuasted."). This is exactly what occurred in the instant case where the Sixth Circuit expressly noted, "we rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Thompson*, 373 F.3d at 691.

The Sixth Circuit's decision resulted from a *sua sponte* rehearing of the case. There is no question that the court's action was legitimate. The inherent authority of an appellate court to conduct a rehearing *sua sponte* is well established. *See e.g., Bagley v. Byrd*, 534 U.S. 1301-1302 (2001)(*en banc* court of appeals *sua sponte* reheard and remanded the case); *Ellsworth v. Warden*, 333 F.3d 1, 3 (1st Cir. 2003)(concerned with the precedential effect of ... the panel's rulings, the *en banc* court granted rehearing *sua sponte*); *Triestman v. United States*, 124 F.3d 361, 367 (2d Cir. 1997)("It is well-established that a court of appeals is entitled both to reconsider a prior decision *sua sponte* ... and to order a rehearing *sua sponte*."); *United States v. Briggs*, 939 F.2d 222, 223 (5th Cir. 1991)("we *sua sponte* grant rehearing and withdraw our prior opinion in this case ... substituting the following..."); *Krimmel v. Hopkins*, 56 F.3d 873, 874 (8th Cir. 1995)("because of a concern with the disposition, we vacated that opinion and *sua sponte* ordered a rehearing by the panel"); *Cooper v. Woodford*, 358 F.3d 1117, 1118

(9th Cir. 2004)(although a petition for rehearing is statutorily prohibited, the court has "*sua sponte* power to rehear"); *United States v. Springfield*, 337 F.3d 1175, 1176 (10th Cir. 2003)(panel *sua sponte* vacated its order and substituted it with another order). Therefore, this case represents the situation where a Court of Appeals recognizes both its inherent power and the rule of law and applies each to the unique circumstances of the case before it.

The Sixth Circuit acknowledged *Calderon v. Thompson*, 523 U.S. 538 (1998), and applied it to the different circumstances of this case. *Thompson*, 373 F.3d at 691. The facts place this case squarely within that category of cases which are <u>not</u> governed by the rule in *Calderon*. For example, *Calderon* distinguishes cases where the mandate has not issued for reasons independent of the certiorari petition:

> We should be clear about the circumstances we address in this case. ... This is also not a case of fraud upon the court, calling into question the very legitimacy of the judgment. [citation omitted] Nor is this a case where the mandate is stayed under Federal Rules of Appellate Procedure 41 pending the court's disposition of a suggestion for rehearing en banc.

Calderon, 523 U.S. at 557. In this case, the mandate had not issued for reasons independent of Thompson's certiorari petition.

First, pending before the Sixth Circuit has been Petitioner's motion of August 19, 2003 (App.223). Taking advantage of the fact that the mandate in this case was stayed, Petitioner moved the court to reconsider an order entered on July 26, 2002, wherein the court expanded undersigned counsel's representation to include state court proceedings (App.235). This was important because of the then-pending conservatorship proceedings in state court and because of the obvious need for *Ford*

proceedings should an execution date be set for Thompson.[17] A year after entry of the order, Petitioner moved the Sixth Circuit to restrict counsel's ability to represent Thompson. Thompson opposed this motion (App 237). This administrative issue of the Court of Appeals is the subject of the currently pending *en banc* rehearing in the case of *House v. Bell*, no. 00-6136 (r'hrg. filed 6/24/03). As such, the three-judge panel is awaiting the *en banc* court's decision in *House* and has yet to rule on Petitioner's motion. The Sixth Circuit properly did not issue the mandate given the fact that there is an outstanding matter because "the mandate brings proceedings in a case ... to a close and [] remove[s] it from the [court's] jurisdiction". *The Youghiogheny & Ohio Coal Co.*, *supra*.

Second, the mandate had not issued because the court was undertaking a *sua sponte* rehearing of the case. The fact that the court did not issue a formal order to this effect is of no moment. In *Sparks v. Duval Ranch Company*, 604 F.2d 976, 979 (5th Cir. 1979), the Fifth Circuit Court of Appeals considered the effect of FED.R.APP.PRO. 41 on the court's ability to reconsider a decision:

> Finally, it is asserted that the court somehow lost jurisdiction to hear the cause en banc when no motions for rehearing were filed to the panel and the 21-day period specified for issuance of the mandate by Rule 41, Federal Rules of Appellate Procedure, passed. Even cast in its worst light, that the court lay under a duty imposed by the "shall" language of Rule 41 to issue mandate within that time span, we do not think a failure to perform that duty punctually would deprive the court of jurisdiction. The rule grants us power to shorten or enlarge the specified period [for issuing the mandate] by order. This we did by instructions to the clerk to withhold issuance of the mandate. There is no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though

[17]Tennessee's procedure for determining competency to be executed is set forth in *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

> this might be desirable. And even had there been no order, our jurisdiction would not have been affected...

See also United States v. Rivera, 844 F.2d 916, 921 (2d Cir. 1988)("Because issuance of the mandate is an event of considerable institutional significance ... we are unable to say, ... that the mandate 'issued' simply because it should have been issued, or ... because the statute commands it to issue."); FED. R. APP. PRO. Rule 41(c)(a mandate is effective upon issuance). Because the Sixth Circuit mandate did not issue for reasons independent of the certiorari petition, *Calderon* is not controlling and the court had the power to extend the stay of the mandate and conduct a *sua sponte* rehearing. FED. R. APP. PRO. RULE 41(b)(a court may extend a stay of the mandate).

The circuit courts of appeal are in agreement that intervening Supreme Court proceedings do not impede a court of appeals' ability to reconsider its decision if the mandate was stayed prior to receipt of the order concluding certiorari proceedings. In *First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995), under similar circumstances as presented here, the Fifth Circuit vacated its prior opinion and substituted a new opinion, after this Court denied certiorari. The Court of Appeals rejected the argument that, because the mandate should have issued pursuant to Federal Rules of Appellate Procedure 41, the standards for recall of the mandate had to be met. The Fifth Circuit explained that prior to the denial of certiorari, it stayed the mandate for an independent reason (to permit an *en banc* poll). *Id.* at 896. The court held that because the stay was in effect for a reason independent of the petition for certiorari and "prior to the receipt of the order [denying certiorari], we retain discretionary control over our mandate." *Id.* at 897-98. *See also Alphin v. Henson*, 552 F.2d 1033, 1034 (4th Cir.

1977)(revisiting a case after certiorari was denied because the mandate had been stayed in order to allow rehearing and prior to the denial of certiorari); *United States v. Fairchild*, 51 F.3d 129, 130 (8th Cir. 1995)(after denial of certiorari, the mandate had not yet issued so the court was able to grant defendant's motion for rehearing); *Bryant v. Ford Motor Co.*, 886 F.2d at 1528-1531 (vacating a prior *en banc* opinion even though certiorari had previously been denied because the issuance of the mandate had been stayed for an independent reason before the order denying certiorari was filed in the circuit court). Because the Sixth Circuit stayed issuance of its mandate for reasons unrelated to the certiorari proceedings and before it received notice that those proceedings were concluded, it retained control over the case and over the mandate.

This case is further distinguished from *Calderon* where the Ninth Circuit had to recall the mandate in order to revisit the case because the mandate had already in fact been issued. This implicated "'the profound interests in repose' attaching to the mandate" upon its issuance. *Calderon*, 523 U.S. at 550 (citation omitted). Here, in accordance with its inherent equitable authority, the Sixth Circuit engaged in a *sua sponte* rehearing of its decision before the issuance of the mandate.

Also, in *Calderon*, a divided *en banc* panel of the Ninth Circuit *sua sponte* recalled the mandate, reconsidered the opinion and reversed, 7-4, the three-judge panel's unanimous decision. *Calderon*, 523 U.S. at 546-547. Essentially, the *en banc* court engaged in disputed procedures to overturn the unanimous panel decision. In this case, the original panel corrected its own decision. Initially, there was a three-way split in the panel resulting in a 2-1 affirmance of the district court's judgment, with each

judge authoring an opinion. It was the same three judges who unanimously agreed to *sua sponte* reconsider the case. Upon this *sua sponte* rehearing, the three judges united and unanimously agreed to vacate the district court's judgment. As stated by the panel itself, it conducted a review of the case to determine

> whether our prior ruling was mistaken, because there is, and was, in fact available proof that Thompson was suffering from a serious mental disease or defect at the time of the 1985 offense which would have substantially impaired his ability to conform his conduct to the requirements of the law.

Thompson, 373 F.3d at 693. Finding their prior ruling to be based upon a significant mistake, the panel corrected itself.

Another fact which distinguishes this case from *Calderon* is timing. In *Calderon*, the Ninth Circuit's actions occurred just two days before the scheduled execution which implicated a heightened state interest in finality. *Calderon*, 523 U.S. at 548. Here, the execution date had already been stayed by the district court when the Sixth Circuit issued its opinion. Accordingly, the Sixth Circuit's actions, unlike the Ninth Circuit's in *Calderon*, did not disrupt the State's execution efforts and therefore do not require the intervention of this Court.

The Sixth Circuit conducted a *sua sponte* rehearing of the case, rather than a recall of the mandate. The facts of this case place it outside of the rule in *Calderon*. Nonetheless, should this Court determine the Court of Appeals' action was more akin to the Ninth Circuit's recall of the mandate in *Calderon*, the alternative holding of Judge Suhrheinrich also places this case outside the rule in *Calderon*. The concurring/ dissenting opinion, penned by Judge Suhrheinrich, adequately sets forth the facts

supporting a finding of fraud upon the court. *Thompson*, 373 F.3d at 690. Judge Suhrheinrich's opinion is an appropriate alternative basis supporting the Sixth Circuit's conclusions. *Calderon*, 523 U.S. at 557 (fraud on the court is an exception to the rule). For these reasons the petition should be denied.

IV. The United States Court of Appeals for the Sixth Circuit permissibly exercised its inherent equitable power to supplement the record on appeal

The question presented in the Sixth Circuit's opinion is whether that court has the power to supplement the record on appeal:

> The majority opinion holds that we can exercise our inherent equitable power to supplement the record on appeal. Here, I agree...

Thompson, 373 F.3d at 742 (Suhrheinrich, J., concurring). The Court of Appeals recognized the rule of law that "[o]rdinarily, a court of appeals should only consider evidence made part of the district court record." *Id.* at 689. The court also noted FED. R. APP. PRO. 10(e) is a recognized exception to this rule. *Id.* Finally, the court recognized its own exception to this rule based upon its inherent equitable power to pursue the interests of justice. *Id. citing Prather v. Rees*, 822 F.2d 1418, 1420 n.1 (6th Cir. 1987); *Adams v. Holland*, 324 F.3d 838 (6th Cir. 2003) *rev'd on other grounds*, *Holland v. Jackson*, 542 U.S. ___, 124 S.Ct. 2736 (2004). Agreeing with the overwhelming majority of circuit courts of appeal and commentators alike,[18] the three-

[18] *United States v Aulet*, 618 F.2d 182, 187 (2d Cir. 1980); *In re Capital Cities/ABC, Inc.'s Appl. for Access to Sealed Trs.*, 913 F.2d 89, 97 (3d Cir. 1990); *United States v. McBride*, No. 04-6019, 101 Fed. Appx. 921, 922 (4th Cir. July 1, 2004)(unreported)(granting motion to expand the record on appeal); *Gibson v. Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984); *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993)("When the interests of justice demand it, an appellate court may order the record of a case enlarged."); *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970); *Mutch v. Morgan*, No. 01-35820, 71 Fed. Appx. 640 n.1 (9th Cir. July 24, 2003)(unreported)(granting motion to expand the record on appeal and remanding for district court to consider evidence); *United States v. Musgrove*, No. 99-10340, 2000 U.S. App. LEXIS 12591 n.3 (9th Cir. June 5, 2000)(unreported)(granting government's motion to expand the record on appeal to include subsequent mental health evaluations); *United States v. Kennedy*, 225 F.3d 1187, 1192 (10th Cir. 2000); *Dickerson v. Alabama*, 667 F.2d 1364, 1367-68 & n.5 (11th Cir. 1982)("...it is clear that the authority to do so exists" based upon "this Court's inherent equitable powers to supplement the record."); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986); *Gatewood v. United States*, 93 U.S. App. D.C. 226, 209 F.2d 789, 792-93 & n.5 (D.C.Cir. 1953); Charles Alan Wright et al., *Federal Practice & Procedure* § 3956.4, at 349-51 (3d ed. 1999 & Supp. 2003); 20 *Moore's Federal Practice*, § 310.10[5][f], at 310-19 (3d ed. 2000).

judge panel unanimously held that "the circumstances of this case merit consideration of the Sultan deposition pursuant to our equitable power to supplement the record on appeal," *Thompson*, 373 F.3d at 691, and "the interests of justice require" such equitable action. *Id.* at 690. The court proceeded to review "the entire certified record," *id.* at 692, vacate the district court's grant of summary judgment to Petitioner and remand the case for further proceedings not inconsistent with its opinion. *Id.*

Petitioner ignores the holding in the instant case that, under limited circumstances, the court may exercise its inherent equitable power to supplement the record on appeal. Instead, Petitioner criticizes the Court of Appeals for "fail[ing] to perceive its action," not as expressly stated in its opinion, but in the manner interpreted by Petitioner (petition p.25). Petitioner also fails to reconcile the court's actual holding with the series of hypotheses and inferences the petition sets forth to re-package the Sixth Circuit's action under AEDPA's successor provisions, 28 U.S.C. §2244(b).

In order to reach the successor question grafted onto this case by Petitioner, this Court would have to find (a) expansion of the record by a court of appeals prior to the issuance of the mandate is the equivalent of a second or successive petition by a

habeas petitioner, *see* petition p.22, (b) 28 U.S.C. §2244(b)(1) automatically governs this expanded record, *see* petition p.22-23, (c) if a court of appeals does not issue the mandate there can be a *de facto* issuance and a *de facto* recall, (d) a court of appeals' *sua sponte* reconsideration of its decision before the mandate issues is always equivalent to a recall of the mandate, *see* petition p.23, and (e) a court of appeals does not have the power to correct a mistaken ruling prior to the issuance of the mandate. *Compare Thompson*, 373 F.3d at 692-693 (Suhrheinrich, J., concurring)("As a result of my review of the entire certified record, I feel that it is incumbent upon me, as a judicial officer sworn to uphold the Constitution, and as authoring judge of the initial opinion, to reverse that ruling and issue this opinion."). Accordingly, to reach the issues posed by Petitioner, this Court would have to address a series of questions all centered around the federal courts' inherent "power over [their] own judgments." *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957).

This case, which presents a straight-forward application of a court of appeals' inherent equitable authority to expand the record on appeal, is not the proper vehicle for such machinations. The fact that Petitioner must arrange so many hoops for this Court to jump through to reach the issues suggested in the petition highlights the distinguishable and unique factual circumstances of this case, circumstances which are unlikely to be repeated. For these reasons, the petition should be denied.

V. Under the circumstances of this case, 28 U.S.C. §2254(e)(2) is not triggered because the state courts were presented with the evidence considered by the Sixth Circuit Court of Appeals. Nevertheless, the Sixth Circuit substantially complied with §2254(e)(2).

Petitioner's statement that Dr. Sultan's deposition has not previously been

presented to the state courts (petition p.28) is factually incorrect. The state courts were presented with Dr. Sultan's report and deposition, as well as information regarding the State-initiated conservatorship proceedings. Thompson's state *coram nobis* petition and reply expressly argued Thompson was denied effective assistance of counsel and expert assistance during his state court proceedings.[19] The state trial court noted that "Petitioner [Thompson] has attached several mental health expert affidavits in support of his Petition," one which was from Dr. Sultan, but made the erroneous finding that they "all ... had been obtained for use either at his murder trial or at his previous post-conviction trial proceedings." (App.197). Thompson was denied *coram nobis* relief. The Tennessee appellate courts did not disturb the trial court's ruling. (App.199, 205) . Because Thompson presented the state courts with identical facts and constitutional claim at issue in this case, §2254(e)(2) is not triggered.[20]

Thompson's Sixth Circuit briefs extensively argued that he did not fail to develop claims in the state courts because he was denied funding for a mental health expert to conduct a full evaluation and render an ultimate opinion, because of prosecutorial interference and because the state appellate courts erroneously penalized Thompson for not presenting an expert opinion and retroactively applied procedural rules to Thompson's prejudice in order to avoid reviewing the post-conviction trial court's decision to deny expert funding (App.258-272, App.273-289). For these reasons,

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[19]Argument regarding denial of effective assistance of trial counsel is contained at App.11-15 and denial of expert services at post-conviction is contain at App.29,32.

[20]Because the state courts made no factual findings with regards to the merit or weight of the facts or legal issue, 28 U.S.C. §2254(e)(1) is also inapplicable.

Thompson did not fail to develop proof regarding his mental state at the time of the crime.

The Sixth Circuit's January 9, 2003, opinion originally "assumed" (without deciding) Thompson "did not 'fail to develop' these claims below," *Thompson*, 315 F.3d at 594-595. In the opinion at issue, the court substantially complied with §2254(e)(2) when it found the state appellate court unreasonably decided the merits of the *Strickland* claim because Thompson was denied the tools required to prove his claim:

> In light of Dr. Blair's post-conviction testimony that a full history was needed to determine whether Thompson was schizophrenic at the time of the offense, the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under *28 U.S.C. § 2254(d)(1)*.

Thompson, 373 F.3d at 729. Even without an express reference to §2254(e)(2), the court clearly adopted Thompson's argument regarding §2254(e)(2) and set forth a legitimate basis (denial of funding) to find that Thompson did not fail to develop facts about his mental health at the time of the crime.

These facts distinguish this case from *Holland v. Jackson*, 542 U.S. ___, 124 S.Ct. 2736 (2004), decided five days after the Sixth Circuit issued its opinion in this case.[21] Moreover, with the advent of *Holland v. Jackson* directing federal courts to expressly set forth an analysis under §2254(e)(2), the issue regarding substantial compliance with §2254(e)(2) is unlikely to recur. Accordingly, the petition should be denied.

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[21]Remand pursuant to *Holland v. Jackson* is unnecessary because the Sixth Circuit expressly found facts supporting a §2254(e) analysis. A remand would, therefore, not produce a different result.

CONCLUSION

WHEREFORE, based upon the above stated reasons Thompson respectfully requests this court to deny the petition.

Respectfully submitted,

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